U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 January 2005

BALCA Case Nos.: 2004-INA-131, et al.
ETA Case No.: P2001-AZ-09500610/ET, et al.

In the Matters of:

KNIGHT TRANSPORTATION,
Employer,

on behalf of

BUENDIA, JULIAN BAUTISTA	**2004-INA-131**
BONTIGAO, SIEGFRIED AMARRADOR	**2004-INA-132**
BONGALOS, ORLANDO GRANADEROS	**2004-INA-133**
BUSCANO, DOMINADOR CORTEZ	**2004-INA-134**
JAYME, EVERAN DE LA CRUZ	**2004-INA-135**
GALUPE, OLIVIO PAGADUAN	**2004-INA-136**
GAMAYO, RODOLFO VALENZUELA	**2004-INA-137**
GANZON, ALFONSO DAYRIT	**2004-INA-138**
GARCIA, ROLANDO NAVA	**2004-INA-139**
GAYO, ERNESTO ULATAN	**2004-INA-140**
GERONIMO, WILLIAM MONTALES	**2004-INA-141**
GONZALBO, OSCAR ARELLANO	**2004-INA-142**
GOROSPE, NOEL QUERIDO	**2004-INA-143**
GUCE, FIDELINO PAJARITO	**2004-INA-144**

INDO, ROMEO MENDOZA	**2004-INA-145**
INGLES, ERWIN AUGUIS	**2004-INA-146**
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DIAMANTE, ARMANDO AYONO	**2004-INA-151**
RODRIGUEZ, FRANCISCO NAGUIT JR.	**2004-INA-152**
CHUA, ROWENO SEBUK	**2004-INA-153**
CORNEJO, POFERIO ENARIO JR.	**2004-INA-154**
CRUZ, BENJAMIN IGNACIO	**2004-INA-155**
FABRO, ADELIO CASTILLO	**2004-INA-156**
TOLENTINO, EFREN SERRANO	**2004-INA-157**
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VASQUEZ, EMMANUEL UMALI	**2004-INA-161**
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CANLAS, OSCAR SAPAN	**2004-INA-163**
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CASTRO, EMERITO BAUN	**2004-INA-166**
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CO, FERNANDO CABIGTING	**2004-INA-168**
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PILIEN, ALEJANDRO GALINATO JR.	**2004-INA-176**
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VILLAS, VIDAL INQUITO JR.	**2004-INA-186**
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QUINTO, ROLANDO DABU	**2004-INA-195**
DE LOS SANTOS, ALEJANDRO VALENZUELA	**2004-INA-196**
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LOMOTAN, ROMMEL RODRIGUEZ	**2004-INA-203**
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RUIZ, FERNANDO MANA	**2004-INA-209**
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SANTIN, EDUARDO URBANO	**2004-INA-211**
MANZON, FRANCISCO USON	**2004-INA-212**
JUNIA, CHITO LAGUTAN	**2004-INA-213**

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MELENDRES, RUBEN CRUZ	**2004-INA-215**
MAMARIL, DOMINGO BOJO	**2004-INA-216**
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ARGARIN, JOE DENNIS OPEDA	**2004-INA-247**
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ARREOLA, EMIDIO BERMIO	**2004-INA-250**
ANDO, JESSIE ANGULA	**2004-INA-251**
AQUINO, RONALD DUCLAYAN	**2004-INA-252**
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BACOLOD, REGALADO TAMBAL JR.	**2004-INA-261**
BASILOY, RENE FIGUEROA	**2004-INA-262**
BEADO, JOSE AGLIBUT	**2004-INA-263**

Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Josue S. Villanueva, Esquire
Glendale, California
For the Employer and the Aliens

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

These cases arise from applications for labor certification filed by Knight Transportation ("the Employer") on behalf of 133 Aliens for the position of Tractor Trailer Driver pursuant to section 212(a)(14) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") denied the applications, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the records upon which the CO denied certification and the Employer's requests for review, as contained in the Appeal Files ("AF") and any written arguments of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

The following Statement of the Case is based on the Julian B. Buendia application, which is representative of the Appeal Files in all of the cases. The applications are virtually identical in regard to the issues raised and dealt with by the CO in the Notice of Findings and Final Determinations, and the evidence and argument presented by the Employer in the rebuttals, request for reviews, and appellate briefs. "AF" is an abbreviation for "Appeal File."

The Employer filed the application on behalf of Mr. Buendia on October 2, 2000, for the position of Tractor Trailer Driver. (AF 29). A six month experience requirement and a special requirement of "Must be able to obtain Arizona commercial driver's license" were typed onto the ETA750A form, but both were crossed out and initialed. *Id*. Thus, the ETA 750A lists **no requirements** for the job. The job duties were stated to be:

> Drives tractor trailer applying knowledge of commercial driving regulations, to transport and deliver products or materials over long distance. Maneuvers vehicle into loading or unloading position, following signals from loading crew as needed. Drives tractor trailer to weigh station before and after loading and along route to document weight and conform to state regulations. Maintains driver log according to Interstate Commerce Commission regulations. Inspects tractor trailer before and after trips and submits report indicating truck condition. Reads bill of lading to determine assignment. Loads or unloads, or assists in loading and unloading tractor trailer.

The Appeal File is sketchy as to the initial processing of the case. A letter indicates that the CO received the matter as a reduction in recruitment request (AF 35), but evidently the matter was processed for regular supervised recruitment in July of 2003. The Appeal File contains neither the advertisements nor the original recruitment report. Rather, the trail of the processing of the case picks up essentially with the Notice of Findings.

The CO issued the Notice of Findings proposing to deny labor certification on September 24, 2003, citing therein 20 C.F.R. §§ 656.21(b)(6) and 656.24(b)(2)(ii). (AF 25-28). The CO found that the instant job offer required no experience or other special requirements, and observed that the newspaper advertisement and job posted stated that there were multiple openings, that no experience was required, and that the Employer was willing to train. The CO found that 16 job applicants had been presented to the Employer, and that the Employer had sent those applicants a letter and an application form, with instructions to fill it in and mail it back. The CO noted that the letter stated that the Employer would accept all qualified applicants but would give preference to those who have current CDLs[1] and have at least six months of trailer driving experience. According to the CO, the Employer reported that all applicants were called to follow up their applications and that only three responded.

The specific concerns listed by the CO in the NOF were:

- that the Employer stated to the applicants that it would give preference to those who have current CDLs and have at least six months trailer driving experience, when such experience was not stated on the ETA 750A.

- that it appeared that the requirement of filling out an application form as directed in the Employer's contact letter had a chilling effect on applicants.

The CO stated that the Employer's recruitment report was unclear as to whether it hired three of the applicants, and that the remaining 12 applicants[2] were considered by the CO to have been qualified for the position.

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[1] The Appeal File does not state what the abbreviation CDL stands for, but presumably it is "commercial driver's license."

[2] There were 16 applicants, so the CO's NOF is unclear as to why this reference is to 12 rather than 13 remaining applicants.

The NOF concluded with the instruction that the Employer "[s]ubmit rebuttal which documents that the employer made a good faith effort to recruit U.S. workers and explain how each of the U.S. workers . . . was rejected solely for lawful, job-related reasons."

The Employer submitted a rebuttal on October 20, 2003. (AF 7-24). The rebuttal indicates that the Employer made the telephone calls first, and then sent by certified mail the Employer's standard employment application. According to the Employer's rebuttal letter, three applicants responded. One was rejected for not completely filling out the application, one was rejected for having previous moving violations, and the last was rejected for not having a commercial driving license and not having an intent to obtain one or to undergo training as a tractor-trailer driver. The last applicant was also rejected because he had not worked since August 2001.

The Employer observed that under 20 C.F.R. § 656.24(b)(2)(ii), to be qualified, U.S. workers must be able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. The Employer then noted that U.S. Department of Transportation regulations at 49 C.F.R. § 391.11 require that a motor carrier may not allow a person to drive a commercial motor vehicle unless that person is qualified to drive such a vehicle. The regulations list several qualifications, such as being at least 21 years of age, being physically able to drive, and having a currently valid commercial motor vehicle operator's license issued by one State or jurisdiction, among other qualifications. The Employer observed that 20 C.F.R. § 656.20(c)(7) provides that job offers must clearly show that the job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law, and that the DOL's *Occupational Outlook Handbook* provides that truck drivers must have a State driver's license and have a clean driving record. Thus, the Employer argues that the DOT requirements are implicitly included in the job offer. In support, the Employer cites *Norfolk Public School System*, 1999-INA-125 (Aug. 18, 1999) (required state teaching license found to be an implicit job requirement).

In regard to the issue of whether the applicants were discouraged by the contact letter's statement that preference is given to applicants with current CDLs and six months of trailer driving experience, the Employer argued that without verification of such by the applicants, the CO's assertion lacks a foundation. The Employer observed that the letters were in fact encouraging, stating that all qualified applicants would be accepted, and that the advertisement and job duties stated that there are multiple openings, that no experience is required and that the employer will train. The Employer stated it has 400 truck driver positions, and therefore would like to accept all applicants, but that it must comply with DOT regulations.

In regard to good faith efforts to recruit, the Employer stated that, except for one applicant who did not provide a telephone number, it contacted the other 15 applicants three times, to wit:

> [The Employer's'] recruitment manager, Jason Jones, called each applicant on July 28. He again called each applicant on August 4. On July 28, the employer's Director of Human Resources, Jared Knight, sent to all sixteen applicants letters clearly telling them that all qualified applicants will be accepted and asking them to complete [an] enclosed application form and to mail it back soonest. They were advised that the information they will provide in the application is "required by D.O.T. Regulation Part 391.23."
>
> Only three applicants responded to these attempts by the employer. Hence, only three were considered for hiring.

(AF 11). The Employer argued that this constitutes reasonable efforts to contact applicants under *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*).

In regard to the CO's finding that requiring applicants to fill out an application form had a chilling effect, the Employer asserted that it has no motive to dissuade applicants: it needs truck drivers and devotes considerable resources in the recruitment of qualified truck drivers, and in their development and retention. (AF 12). The Employer stated that the application form is a Federal requirement under 49 C.F.R. §§ 391.23 and 391.21, and that it is the same form that is sent to all applicants.

In regard to the CO's citation for not scheduling a face-to-face interview, the Employer cited *Matter of Brewster*, 1988-INA-390 (1989) for the proposition that a pre-screening through a questionnaire is permissible in certain circumstances. The Employer indicated that had the non-responsive applicants provided the requested information, it would have been able to determine their qualifications under DOT guidelines and regulations without a face-to-face interview.

Attached to the rebuttal is a recruitment report detailing the Employer's recruitment. (AF 17-24).

The CO issued a Final Determination on December 10, 2003. (AF 4-6). The CO focused on the third U.S. applicant who was rejected for not having a current commercial license and for purportedly not being willing to obtain one or undergo training, and for having a recent gap in his work history. The CO found that the Employer had presented no evidence that this applicant was unwilling to undergo training or was unwilling to obtain the appropriate license. The CO also found unpersuasive an assertion by the Employer in the rebuttal to the effect that the applicants chose not to respond because they were not qualified. The CO found this to be speculative. The CO found that the letter stating a preference for CDL license and experience had a chilling effect on applicants.

DISCUSSION

Unlawful rejection of U.S. applicant

In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *Mancilla International Ltd.*, 1988-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 1987-INA-635 (Jan. 12, 1988). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on

the ETA 750A and in the advertisement for the position. *American Cafe*, 1990-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 1988-INA-492 (Sept. 19, 1990); *Richco Management*, 1988-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 1988-INA-29 (Apr. 7, 1988).

We find that the Employer unlawfully rejected the third applicant without an interview. The Employer's rebuttal asserts that this applicant was not qualified because he did not have a commercial driver's license, and was unwilling to be trained or to obtain such a license. This ground for rejection of the applicant, however, is not presented in the recruitment report, and we concur with the CO that it is unsupported by any evidence. Since the Employer did not personally interview this applicant, it is not evident how the Employer could know whether the applicant was unwilling to receive training or to obtain a commercial driver's license. Where an applicant's resume is ambiguous as to whether it establishes qualifications for all of employer's job requirements, it is the Employer's duty to further investigate an applicant's credentials, by interview or other contact. *Creative Cabinet & Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*).

The second ground proffered by the Employer for rejecting this applicant was that his resume did not show any work since August 2001. This ground is evidently based on the DOT regulation requiring an employer to obtain a completed application form from a driver that discloses, *inter alia*, "[a] list of the names and addresses of the applicant's employers during the 3 years preceding the date the application is submitted, together with the dates he/she was employed by, and his/her reason for leaving the employ of, each employer." 49 C.F.R. § 391.21(b)(10). If the ground for rejecting this applicant is that the DOT regulation prevents hiring the applicant because he could not state a employer for each of the preceding three years, it is not a rational reading of the regulation. Rather, all that the DOT regulation requires is that the driver lists his employers -- not that the driver have an unbroken record of employment. Logically, this only means that a driver should list employers, if applicable.

To the extent that the Employer believed that the recent gap in employment history indicated a lack of reliability on the part of the applicant, without supporting evidence this is a subjective conclusion of the Employer inadequate to support a lawful rejection of the applicant. *Bahman Nourafshan*, 1990-INA-95 (Dec. 10, 1991). In the instant case, given the Employer's lack of job requirements and alleged desperate need for truck drivers, the Employer's failure to even interview this applicant to determine the reason for the gap in employment history reinforces the lack of foundation for this subjective ground for rejection of the applicant.

Thus, we affirm the CO's finding that Applicant # 3 was unlawfully rejected.

Discouraging effect of contact letter

In the NOF, the CO identified two problems with the Employer's contact letter that allegedly had the effect of discouraging applicants: (1) the requirement of filling out and returning an application, and (2) stating a preference for applicants with a current commercial driver's license and at least six months of experience. In the Final Determination, the CO only cited the "stating a preference" ground as his reason for denying the application. The Employer presented rebuttal asserting that the application was a standard form sent to all applicants and was a DOT requirement. Thus, since the CO did not renew the "returning an application" problem in the Final Determination, the Board considers the CO to have accepted the Employer's rebuttal on this point. *Loew's Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*) (Board refused to decide an issue where the FD did not preserve the issue).[3] Accordingly, we limit our review to the "stating a preference" issue.

[3] We express no opinion on whether the Employer's request for applicants to return the application form put an impermissible chill on the recruitment process. *Compare Heinz Construction Inc*., 2003-INA-114 (Mar. 19, 2004) (greater scrutiny paid to extra steps such as requiring an additional application because of their potentially chilling impact on recruitment). We only hold that the CO did not preserve the issue in the Final Determination.

An employer who by its actions discourages U.S. applicants from pursuing the job opportunity has not shown a good faith effort to recruit U.S. workers, and has not established lawful, job-related reasons for rejecting U.S. workers. *Budget Iron Work*, 1988-INA-393 (Mar. 21, 1989) (*en banc*); *Sunrise Drywall*, 2003-INA-43 (Mar. 29, 2004) (*per curiam*).

In the instant case, the Employer specifically agreed to the deletion of the "current commercial driver's license" and "six months of experience" requirements on the ETA 750A form. It is not clear, therefore, what purpose the Employer was promoting in stating in the contact letter its preference for applicants with these qualifications other than to discourage less experienced and unlicensed U.S. applicants from following up on their applications. Moreover, the Employer's statement in rebuttal that it would like to accept all applicants cuts against a need for informing applicants that it has a preference for experienced drivers with a current license. Thus, although there were portions of the letter that indicated a willingness to hire and train inexperienced, unlicensed applicants, we concur with the CO that the inclusion of the statement of preferences in the contact letter appears to have been for the purpose of trying to discourage less experienced and unlicensed U.S. applicants. Whether or not this was the Employer's intention, it was the probable effect. Although the Employer argues that the CO could not just assume that applicants were discouraged from pursuing the application, the Employer's communication of its preferences to the applicants was not ambiguous or subtle. We observe that the Employer has not proffered any reason for stating the preference. In such a circumstance, we do not find the fact that the CO did not interview the U.S. applicants to determine if they were actually discouraged to be a valid defense.

Accordingly, we affirm the CO's holding that the Employer failed to rebut the NOF citation of lack of good faith recruitment.

Remedy where number of similarly processed labor certification applications exceeds the number of available U.S. workers

In the instant case there were 133 positions open. The Employer questioned the fairness of rejecting all of the applications when there were only 16 U.S. applicants.

The problems with the application arose when the Employer discouraged applicants with its recruitment letter, and when it rejected one apparently qualified applicant for legally insufficient grounds. We find that the problems with the recruitment and assessment of applicants, therefore, were not isolated, wholly innocent, or merely technical in nature. The essence of these cases is that the Employer did not recruit in good faith.

Where an employer did not recruit in good faith, it is not unfair to not permit the employer to resurrect some of its applications based on the fortuitous circumstance that there were fewer U.S. applicants than jobs available or that the same group of U.S. applicants is presented for numerous applications. The instant case is more extreme than typical in that the number of positions greatly outnumbered the U.S. applicants. Nonetheless, the principle that a lack of good faith in recruitment requires rejection of the application remains the same.

ORDER

The Certifying Officer's denial of labor certification in the above-captioned cases is hereby **AFFIRMED**.

For the panel:

A

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.